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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 456

HORACE CHANDLER DAVIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HORACE CHANDLER DAVIS,
Petitioner.
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Horace Chandler Davis prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 21, 1959.

Opinions Below

The opinion of the District Court for the Western District of Michigan is not officially reported. It appears at page 62a of the Joint Appendix. The opinion of the Court of Appeals for the Sixth Circuit (pp. 8-17, *infra*) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on August 21, 1959 (p. 18, *infra*). On September 16, 1959, Mr. Justice Stewart extended the time for filing a petition for writ of certiorari to and including October 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Rule 22 (2).

Questions Presented

Whether, in light of the United States Constitution, Amendment I, an investigative committee of the Congress of the United States has power to compel testimony by a private citizen as to his ideas, or as to his associations and activities directed to recommending his ideas to others.

Whether, in light of the First Amendment, an investigative committee of the Congress retains any governmental authority whatever while conducting a public hearing designed to direct unreasoning scorn, obloquy and ridicule by the public upon a political doctrine, and upon a witness if he does not repudiate the doctrine.

Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution, as well as 2 U.S.C. § 192 and the relevant portions of Rule XI of the House of Representatives, H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18, are set forth in Appendix A, *infra*, pp. 6-7.

Statement

This case originates in petitioner's appearance May 10, 1954, in Lansing, Michigan, before a subcommittee of the Committee on Un-American Activities of the House of Representatives. Petitioner appeared pursuant to subpoena and was not accompanied by counsel. He announced early in the hearing his opinion that the Committee lacked legitimate power to compel testimony on political beliefs and associations, and his intention to refuse to answer such questions. Among the questions he refused thereafter to answer was the question, "Are you now a member of the Communist Party?" He explicitly refrained from exercising the Fifth Amendment privilege to refuse to testify against himself.

Petitioner was indicted by the Grand Jury for the Western District of Michigan on September 2, 1955. The indictment charged the crime of Contempt of Congress, under 2 U.S.C. § 192, and specified twenty-six instances at the hearing described of petitioner's refusal to answer questions. Petitioner was tried without a jury before the District Judge, who found him guilty, and imposed a fine of $250.00 and a jail sentence of six months. Appeal was taken to the Court of Appeals, which affirmed the conviction, relying on *Barenblatt* v. *U.S.*, 360 U.S. 109, recently decided by this Court.

Reasons For Granting The Writ

1. This Court based its decision in *Barenblatt* v. *U.S.*, 360 U.S. 109, on an interpretation of the First Amendment limitations upon Congress which is in conflict with its holding in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642. The conflict can be resolved only if considered anew by this Court.

2. That speech which the First Amendment was primarily intended to protect is exchange of opinion between citizens on matters of public policy as a necessary preliminary to formulating the will of the ruling electorate. The protection of this category of speech by the First Amendment may not be subordinated to any governmental exigency; for the government's power derives from the will of the people. "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Madison, Annals of Congress, 3d Cong., 934. See also Meiklejohn, Free Speech and its Relation to Self-Government, 25, 26. Despised or anti-democratic opinions are included among those protected, that they may enter into the contention of ideas from which the people's decisions emerge. *U.S.* v. *Roth*, 354 U.S. 476, 484. See also Mill, On Liberty.

3. The House Committee on Un-American Activities investigates primarily "subversive and un-American propaganda"—which can only mean advocacy before the citizenry of certain censured ideas. H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18 (pp. 6-7, *infra*). The usual interrogation by the Committee, and in particular the interrogation of the petitioner in the present case, confronts the witness with the suggestion that he has advocated, or belonged to organizations which advocated, the "un-American" ideas. This is in effect a test oath, a demand that the witness either repudiate the ideas, or accept the opprobrium attached to them by avowing them or refusing to answer. By conducting the hearings publicly the Committee apprises the people that to entertain "un-American" ideas is dangerous. *Watkins* v. *U.S.*, 354 U.S. 178, 197. The additional message, that to entertain these ideas is shameful or disgusting, is equally intolerable: an agency of government may urge

upon the people reasons for favoring one side or another of an issue, but may not urge the people to withdraw from considering the issue at all.

4. The described violation of the First Amendment could not be removed by the Committee's operating under a reworded charter, or altering its forms, so long as the nature of the hearings was unaltered. The violation occurs as soon as the hearing becomes a political test oath and expose; regardless of the witness's response, the proceeding is invalidated. There can be no crime of contempt for refusal to cooperate with an invalid proceeding.

5. The question is important because the Committee's hearings continue on the same pattern in the present Congress and the same damage to the people's free speech is done.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE CHANDLER DAVIS,
Petitioner

Appendix A

CONSTITUTION OF THE UNITED STATES, AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CODE, TITLE 2, SEC. 192

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

EXCERPTS FROM RULES OF THE HOUSE OF REPRESENTATIVES, 83d CONGRESS, RULE XI, 17 (b):

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto

that would aid Congress in any necessary remedial legislation.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. . . .

Appendix B

OPINION OF COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED AUGUST 21, 1959

The appellant was indicted under a twenty-six count indictment for contempt of Congress in violation of Sec. 192, Title 2, U. S. Code. He was tried by the Court without a jury. The District Judge treated the twenty-six counts as charging only one offense, made a finding of guilty, and imposed a fine of $250.00 and imprisonment for a period of six months. Judgment was stayed pending this appeal.

Appellant had been a student at Harvard College from 1942 to 1945 and had received his B. S. degree therefrom. He received the degree of Ph. D. from Harvard University in 1950. Thereafter, he had been employed as a teacher of mathematics at the University of Michigan.

Count 1 of the indictment states that a standing Committee on Un-American Activities was duly elected and certified by the House of Representatives of the 83d Congress of the United States in accordance with the provisions of Public Law 601, 79th Congress, Chapter 753, 2nd session, known as the Legislative Reorganization Act of 1946; that beginning on February 23, 1953, said Committee commenced public hearings into "Communist Methods of Infiltration into Education", in accordance with provisions of Public Law 601 and the authority and power of said committee, as provided by Rule XI of House Resolution No. 5; that thereafter, on May 10, 1954, public hearings were held in Lansing, Michigan, by a duly appointed and authorized subcommittee of said Committee on Un-American Activities; that the appellant appeared before said subcommittee on May 10, 1954; that during the course of said hearing appellant was asked the following pertinent question to the inquiry:

"During the period of time that you were at Harvard as an undergraduate, say between 1942 and 1945, were you aware of the existence on the campus or in Cambridge of an organized group of the Communist Party made up chiefly of members of the student body of Harvard?"

and that the appellant deliberately and intentionally refused to answer said question claiming privilege under the First Amendment to the Constitution of the United States and persisted in such intentional refusal although directed to answer.

Each of the remaining counts incorporated the allegations of the first count with respect to the creation of the standing Committee on Un-American Activities and its subcommittee and the hearing on May 10, 1954, and in addition stated that the appellant was asked another pertinent question to the inquiry which he deliberately and intentionally refused to answer.

The questions set out in counts 1 through 11 dealt with alleged Communist activities at Harvard University and the appellant's awareness of the existence of such groups and certain named persons as having been active in such groups. The questions set out in counts 12 through 20 dealt with appellant's connection with and participation in the dissemination of a pamphlet entitled "Operation Mind" which called upon the people of Detroit to oppose the Committee's presence in the Detroit area, and which bore the notation, "Distributed by University of Michigan Council of the Arts, Sciences, and Professions, and the Civil Liberties Committee of the University of Michigan." The questions in the remaining counts dealt with certain political beliefs and associational activities of the appellant including the question whether the appellant had any time during 1952 or 1953 solicited membership in the

Communist Party of any faculty member or student of the University of Michigan, whether the appellant was a member of the Communist Party and whether he had ever been a member of the Communist Party. The appellant filed a motion to dismiss the indictment, which was overruled by the District Judge, and also entered a plea of not guilty.

There is no factual dispute between the parties, and the appeal presents purely a question of law. The case was argued to this Court on April 21, 1958, but due to the pending review in the United States Supreme Court of the case of *Barenblatt* v. *United States*, 252 F. (2) 129, C. A. D. C., cert. granted, 356 U. S. 929, which involved some of the same issues as are raised in this case, a ruling on the present appeal was held in abeyance until the Supreme Court decided *Barenblatt*. Its opinion in *Barenblatt* v. *United States* was handed down on June 8, 1959, and is reported at 360 U. S. 109.

Appellant first contends that the Committee was acting under an excessively broad charter, which exceeded the bounds of legislative power; that when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter; that the authorizing resolution of the Un-American Activities Committee and Rule XI which authorized the subcommittee were so broadly drafted and loosely worded as to fail to point out with sufficient particularity the Committee's jurisdiction and purpose, thus violating the rule against vagueness. *United States* v. *Rumely*, 345 U. S. 41; *Watkins* v. *United States*, 354 U. S. 178, 200-205. This contention has been decided adversely to appellant's contention in *Barenblatt* v. *United States*, supra.

The decision in *Barenblatt* v. *United States*, supra, also disposes of appellant's contention that his conviction in this case violates the freedoms of speech and of the press guaranteed by the First Amendment.

In his opening statement the chairman of the subcommittee made the following statement,

> "However, if any witness desires to decline to answer any question propounded, if that witness will so indicate, not through counsel, but through his own words, the fact that he does object, that will be duly noted and recorded. I must caution the witnesses, however, that the committee will recognize as an objection only the Fifth Amendment. We are repeatedly confronted by witnesses who invoke practically all the amendments and the entire Constitution itself."

Appellant contends that this assumption of an absolute power to investigate subject only to the Fifth Amendment was an unwarranted usurpation of power, in that the power to investigate is subject to the First Amendment as well as the Fifth, and that appellant's resistance thereto was accordingly lawful. *Watkins* v. *United States*, supra, 354 U. S. 178, 188.

The statement referred to is not properly relied upon. Committee member Moulder promptly thereafter made the statement, "I want the record to show that I disagree with the chairman's position that only the Fifth Amendment can be relied upon by a witness." The subcommittee chairman thereafter made it clear that the subcommittee was not depriving any of the witnesses of the right to raise any proper objection including all of the amendments. Appellant stood squarely upon the First Amendment. He at no time claimed the protection of the Fifth Amendment. Appellant was not prejudiced in any way by the original incorrect statement.

Sec. 192, Title 2, U. S. Code, makes it a criminal offense for a witness before a committee of either House of Congress in any matter under inquiry by such committee to

refuse "to answer any question *pertinent* to the question under inquiry." (Emphasis added.) We agree with appellant's construction of the statute that in such a hearing part of the standard of criminality is the pertinency of the questions propounded to the witness, that the witness is entitled to be apprised of the object of the inquiry so as to show the connective tissue between the questions asked and the claimed power of the committee, and that the witness must be apprised that the committee demands his answer notwithstanding the objections made by the witness to answering the question. *Watkins* v. *United States*, supra, 354 U. S. 178, 187, 198, 208; *Quinn* v. *United States*, 349 U. S. 155, 165-166. However, we do not agree with his contention that these standards were not complied with.

The acting chairman of the subcommittee in his opening remarks stated that the committee was operating under a printed set of rules which would be scrupulously observed throughout the proceedings, that each witness would be permitted to have counsel sit alongside of him at the table, that counsel would be permitted to advise the witness on his constitutional rights as the hearing progressed, and that if the witness desired, an informal recess would be called so that the witness might counsel at length with his attorney. He also made the following statement,

> "Now, the last thing the committee wants to emphasize is the fact, oft repeated but many times misunderstood, and that is, we are not engaged in an investigation of any institution, educational or otherwise. We are not investigating labor unions. We are not investigating any particular group or stratum; we are concerned primarily with collecting information that will aid and assist the Congress of the United States in the enactment of legislation to cope with the Communist threat to our peace and security,

> and in consonance with that we shall expect each and every witness who takes the stand to observe the rules as they have been laid out and to cooperate with this committee."

During the early part of the questioning of the appellant the following statement was made by the committee counsel,

> "Dr. Robert Gorham Davis testified at some length before this committee regarding the conduct of Communist Party affairs at Harvard during the period he was acquainted with it, he having been a member of the Communist Party at Harvard. The question of influence upon the faculty members upon the student body was discussed by him. He told the committee that at the time he was a member there was no direct connection between the faculty members and the student body on the subject of communism for security reasons. We are very anxious to investigate that situation fully and as at late a period as possible. We want to know from you, if you have knowledge of it, whether or not there was any relationship between the faculty members of the Communist Party and student body members of the Communist Party at Harvard and what influences were brought to bear by one group upon the other."

The evidence also clearly showed that in asking the questions of appellant the subcommittee was following up the recommendations of the Committee on Un-American Activities of the House through prior years in relation to bills which had been recommended at previous Congresses for enactment, and that certain matters of legislation were under consideration at the time of the inquiry.

As a matter of fact, appellant's objection to answering

the question was not based on any failure to be advised of the object of the inquiry or that the questions asked were not pertinent to the inquiry. He stated to the subcommittee, "I have taken pains to inform myself on all important political issues. I will not discuss with the committee what conclusions I reached or what methods I used to inform myself." He also said, "I believe that when you direct me to answer a question concerning my political beliefs or my political affiliations, that is entirely without force." He explained, "It seems to me that such a question infringes my freedom of speech. It infringes my freedom of speech because it seeks to oblige me to discuss my political activities and my political opinions under highly abnormal circumstances. This is not the way you discuss politics for the purpose of arriving at the truth * * *. Therefore I claim that this question is improper since it exceeds the authority of Congress. It oversteps the bounds placed on Congress by the first amendment. Therefore, I am under no compulsion to answer."

We are of the opinion that the appellant was fully apprised of the object of the inquiry which was within the power of the committee and that the questions asked were pertinent to the object of the inquiry. *Barenblatt v. United States*, supra, 252 F. (2) 129, 134-136, C. A. D. C., affirmed, 360 U. S. 109.

Appellant contends that the conviction cannot be sustained because the subcommittee failed to comply with the rule stated by the Supreme Court in *Quinn v. United States*, supra, 349 U. S. 155, 166, as follows: "* * * unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under Sec. 192 for refusal to answer that question." In that case the Court was of the view that it was apparent from the transcript of the hearing that the committee's position was ambiguous, that the appellant was

never confronted with a clear-cut choice between answering the question and risking prosecution for contempt, and that at best he was left to guess whether or not the committee had accepted his objection. We do not think that the proceedings in the present case are properly subject to that construction. The subcommittee made it clear to the appellant that they wanted certain information from him. Appellant left no doubt about his refusal to give the subcommittee this information. In addition to the statement hereinabove referred to, the appellant stated in answer to the question embodied in the first count of the indictment, "That is a question concerning my political associations I believe and I will refuse to answer all such questions before this committee." The appellant also stated before the second question was asked, "* * * and I will refuse to answer any questions of this nature." With respect to the questions asked in counts 10, 11, 16, 17, 19, 20, 21, 22, 24, and 25, the appellant expressly stated that he refused to answer or would not answer.

The subcommittee also made it clear that it was not acquiescing in appellant's refusal to answer the questions. Prior to the asking of the question embodied in the 16th count, a committee member said, "The witness is obviously in contempt of the Congress of the United States", to which the chairman replied, "There is no doubt about that. He has been in contempt all day here." As stated by the Court in *Quinn* v. *United States*, supra, 349 U. S. 155, 170, "Giving a witness a fair apprisal of the committee's ruling on an objection recognizes the legitimate interests of both the witness and the committee. Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain." Appellant's posi-

tive, unqualified statements clearly indicated his position and his refusal to answer, regardless of the subcommittee's ruling.

In any event, it appears that there were express directions to answer the questions forming counts 1, 13, 15, 18, 22, and 24. Since a conviction under any one of the twenty-six counts would sustain the judgment imposed in this case, the failure, if any, to expressly direct the appellant to answer the question forming the basis of another count, does not invalidate the judgment. *Hirabayashi* v. *United States*, 320 U. S. 81, 105; *Polidfico* v. *United States*, 237 F. (2) 97, 112, C. A. 6th; *Kelleher* v. *United States*, 35 F. (2) 877, 879, C. A. D. C.

Although we concur in the view that each count of the indictment constituted a separate offense, *United States* v. *Orman*, 207 F. (2) 148, 160, C. A. 3rd; *Newman* v. *United States*, 212 F. (2) 450, 452, C. A. 6th, we find no merit in appellant's contention that the District Judge erred in treating the twenty-six counts of the indictment as constituting a single offense and in imposing only one judgment. It is ordinarily desirable that a separate sentence be imposed under each count of an indictment on which a conviction is had, but a single or general sentence on two or more offenses charged in the same indictment, without apportioning the sentence to the respective counts in the indictment, is not illegal, provided the sentence imposed is not in excess of the maximum allowed by law for all the offenses of which the defendant is guilty. *Jackson* v. *United States*, 234 F. (2) 605, C. A. 6th; *Hamilton* v. *United States*, 204 F. (2) 927, 928, C. A. 4th, cert. denied, 346 U. S. 858; *Levine* v. *Hudspeth*, 127 F. (2) 982, 984, C. A. 10th, cert. denied, 317 U. S. 628; *Phillips* v. *United States*, 212 F. (2) 327, 335, C. A. 8th; *McKee* v. *Johnston*, 109 F. (2) 273, 275, C. A. 9th. The single sentence im-

posed in the present case was not in excess of the maximum allowed for any one count.

The judgment is affirmed.

This case was argued to a panel of the court consisting of Miller and Stewart, Circuit Judges, and Jones, District Judge. Judge Stewart became an Associate Justice of the Supreme Court of the United States before a decision was reached or this opinion was prepared. He therefore did not participate in the decision, opinion, or judgment in this case.

Appendix C

Judgment of the Circuit Court, August 21, 1959

Appeal from the United States District Court for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.